IN THE

Supreme Court of the United States

October Term, 1971
No. 71-895

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL VAN LINES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

Opinions Below.

The history of the opinions below is adequately set forth in the Board's Brief.[1]

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Board's Brief.

Question Presented.

The Board's statement of the Question Presented does not cover subsidiary questions which are fairly

[1]References to "Pet App" shall refer to the Appendices to the Board's Petition for the Writ of Certiorari. References to "A" shall refer to the separate Appendix to the Board's Brief on the merits. Reference to "Resp App" shall refer to the single appendix to Respondent's Brief on the merits.

comprised within the question presented by the Board. Accordingly, pursuant to Rule 23(1)(c) of the Rules of this Court, Respondent respectfully submits the following additional questions:

(1) Whether striking to force an employer to consent to a Board election was concerted activity protected by Section 7 of the Act under the following circumstances:

(a) No request for recognition was made by the Union either prior to the filing of the Petition or prior to the commencement of the strike.

(b) The Petition filed by the Union failed to allege that request for recognition was made by the Union, or was declined by the Employer.

(c) The strike commenced nine (9) days after the filing of the Petition, which was at that time, being processed by the Board.

(d) The Employer engaged in no acts or omissions to cause delay in the processing of the Petition.

(2) Whether striking to force an Employer to recognize the Union is concerted activity protected by Section 7 of the Act under the circumstances outlined in 1(a) through 1(d) above, and in addition thereto, where the picketing in support of such strike continued for more than thirty (30) days.

(3) Whether a "labor dispute" existed within the meaning of Sections 2(3) and (9) of the Act under the following circumstances:

(a) A strike called to protest dismissal of employees by employers not related to the struck employer (Respondent).

(b) A strike knowingly called on the false pretext that the employer had withdrawn its consent to a Board election.

Only if the foregoing subsidiary and threshold questions are answered by this Court in the affirmative, does it become necessary to address the question presented by the Board. Should this Court determine that the Board's question merits resolution, either as the dispositive issue in the case, or for future clarification, the question should be posed as follows:

> Whether employees engaged in an economic strike, who are discharged for that activity before they have been permanently replaced and then continue to strike, have an absolute right to be reinstated to their former jobs, absent any evidence that the discharges were a significant factor in prolonging the strike.

Statute Involved.

In addition to the sections set forth in the Board's Brief, the relevant provisions of the National Labor Relations Act, as amended, (hereinafter referred to as the "Act") (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

"Section 2. When used in this Act

* * *

"(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms

or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * *

"Section 8(b). It shall be an unfair labor practice for a labor organization or its agents.

* * *

"(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

* * *

"(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing.

* * *

"Section 9

* * *

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof:

* * *

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

* * *

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a)"

* * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * *

"(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

* * *

Regulations Involved.

The relevant provisions of the Rules and Regulations of the Board are as follows:

Section 102.61

Contents of petition for certification; contents of petition for decertification.—(a) A petition for certification, when filed by an employee or group of employees or an individual or labor organization acting in their behalf, shall contain the following:

* * *

(7) A statement that the employer declines to recognize the petitioner as the representative within the meaning of section 9(a) of the act or that the labor organization is currently recognized but desires certification under the act.

* * *

Section 102.63

Investigation of petition by regional director; notice of hearing; service of notice; withdrawal of notice.

(a) After a petition has been filed under § 102.61(a), (b), or (c), if no agreement such as that provided in § 102.62 is entered into and if it appears to the regional director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the act will be effectuated, and that an election will reflect the free choice of employees in the appropriate unit, the regional director shall prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation,

a notice of hearing before a hearing officer at a time and place fixed therein. A copy of the petition shall be served with such notice of hearing. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion.

* * *

Section 102.64

§ 102.64 Conduct of hearing.—(a) Hearings shall be conducted by a hearing officer and shall be open to the public unless otherwise ordered by the hearing officer. At any time, a hearing officer may be substituted for the hearing officer previously presiding. It shall be the duty of the hearing officer to inquire fully into all matters in issue and necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties under section 9(c) of the act.

* * *

Statement of the Case.

The Board's "Statement" of its Findings of Fact (Board Brief, p. 3, *et seq.*) requires some amplification.

(1) The Union made no request for recognition, either prior to the filing of the Petition or to the commencement of the strike (A. 11-13, 43-44).

(2) The petition itself contains no entry as to Item 7a (Resp App, Pet App 36, 40).

(3) The announcement by Teamster Agent Sanders at a meeting with the "men" that Respondent had withdrawn its consent to a Board election was false and was known by Sanders at the time to be false. (Pet App 38, 57-58, 73 note 3).

(4) No consent to a Board election was ever given or withdrawn by Respondent (Pet App 58).

(5) On October 4, 1967 when the picketing and strike commenced, Respondent was awaiting action by the Board on the Union's pending petition for representation (Pet App 74).

(6) There is no evidence and the Board did not find that the Respondent engaged in any conduct to hinder or delay the processing of the Union's petition for an election.

(7) One of the objects of the strike and the picketing was to force Respondent to recognize the Union (A. 15, 22, 24, 26, 38). The picketing continued for more than 30 days (A. 35-37).

(8) On October 4, 1967, Robert McEwan, Respondent's President told Richard Dicus, one of his striking employees, that he had not "withdrawn [his] name for an election" (Pet App 15). Thereupon, Dicus telephoned the union office and conveyed McEwan's message, "that he had not withdrawn [his] name for an election." During that telephone conversation Dicus was again told that Respondent had withdrawn and was sent on picket duty to another Company (Pet App 17). By virtue of the stipulation entered into between Respondent and the General Counsel, Respondent must be deemed to have informed its other striking employees that it had not withdrawn from the election (A. 26).

(9) With the exception of Sal Casillas and the requests made on December 12, 1967, all requests for reinstatement by strikers were conditioned upon Respondent signing a contract with the Union (A. 18, 19, 23, 26-29, 32-37, 49-51).

Summary of Argument.

Respondent will show herein the following:

1. Subsidiary and fairly comprised within the question of the reinstatement rights of the strikers is the question whether or not the strike itself was protected activity within the meaning of Section 7 of the Act.

2. If, as the Board contends, the object of the strike was to force Respondent to forego its right to a hearing and consent to an election, such activity is not protected. The Act unequivocally gives an employer the right to a pre-election hearing. The legislative history of the 1947 Taft-Hartley amendments to the Wagner Act shows a clear Congressional intent to safeguard that right.

3. The petition filed by the Union was fatally defective in that it failed to allege (and indeed could NOT have truthfully alleged) a request for recognition by the Union. Both the Act and the Board's rules and regulations promulgated thereunder require that a Union request recognition prior to the filing of a petition for representation. This fatal defect rendered the petition a nullity. In late November and on December 12, 1967, when the strikers requested reinstatement, they had been picketing for recognition for more than thirty (30) days, without the filing of a *valid* petition. The record establishes that recognition was an object of the picketing at the outset, and *the* object of the picketing as the strike matured. Under those circumstances, the picketing was not protected activity.

4. The strike was not called to protest a current labor dispute within the meaning of Section 2(3) and (9) of the Act. Neither the Union nor any of the striking employees had asked anything of Respondent which Respondent had refused. The dismissal of employees by other employers could not be the basis of a "labor dispute" with Respondent. The fabrication that Respondent had withdrawn its consent to an election was known by the Union to be false and was denied by Respondent to Richard Dicus on the first morning of the picketing. That denial was immediately communicated to the other strikers and to the Union. Nevertheless, the picketing continued. A strike called in bad faith to protest a non-existent grievance, cannot be said to be a labor dispute within the meaning of the Act.

5. The strike continued on and after October 5th, 1967, because Respondent refused to sign a contract with the Union. The telegram sent to strikers on October 5th, 1967, was not a significant factor in prolonging the strike.

6. Assuming *arguendo* that the strike was protected activity, and absent evidence that the termination of the strikers was a significant factor in prolonging the strike, the only appropriate remedy is to restore the discharged economic strikers to their former status as economic strikers. True, an economic striker retains his status as an employee, but it is not appropriate to elevate such striker to active employee status, when in fact by virtue of his own voluntary act he is in an in-

active strike status whereby he has lawfully withheld his services from his employer. To grant to such "employee" absolute reinstatement rights is to go beyond the remedial purpose of the Act. Respondent does not question the authority of the Board to order an employer to restore the "status quo ante" and to make the employees whole for any wages lost by reason of unfair labor practices. However, on the record before this Court, the "status quo ante" is the striker's position before the telegrams of October 5, 1967, which is that of an "Economic Striker," entitled to reinstatement only if not permanently replaced.

ARGUMENT.

I.

The Question: Whether or Not the Strike and Picketing Which Commenced on October 4, 1967, Was Concerted Activity Protected by Section 7 of the Act Is Properly Before This Court.

The question presented by the Board in its Petition for the Writ of Certiorari can only be the basis for a meaningful decision if the subsidiary questions contained therein are also considered. Those questions as set forth hereinabove are both significant and vital to the proper enforcement of the Act and the orderly administration of the National Labor policy. Should this Court pass only upon the question proffered by the Board, it will, by implication, be affirming the findings of the Board and the Court below, to wit: a strike to force an employer to consent to a Board election is protected activity as defined by Section 7 of the Act. Respondent respectfully submits that by placing the issue of the appropriate remedy before this Court, the Board has also submitted the underlying issues as to the nature of the concerted activities and the application thereto of Section 7. Resolution of those issues is threshold to the question of remedy. Respondent is not raising a question as to the adequacy of the evidence in support of the Board's findings. Respondent stands upon those findings in questioning the propriety of the Board's conclusion that the strike was protected activity, *as a matter of law.*

Respondent, a very small company, has been embroiled in this costly litigation for more than four years. The Board's complaint was issued in response to Respondent's reaction to a strike called in bad faith, without notice or reason. Simple economics dictated Re-

spondent's decision to seek no further review following the decision of the Court below. Settlement discussions with the Board's Regional Compliance Officer were making substantial progress when Respondent was informally advised that the Board had decided to seek review. By the time Respondent received a copy of the Board's Brief in support of the Petition for the Writ of Certiorari, on January 12, 1972, the 90 day period for filing its own petition had expired. Respondent's Answer was mailed on February 4, 1972, following its decision, financial hardship nothstanding, to present its case to this Court. Simple principles of equity and fair play should estop the Board from asserting that the Answer (filed in the nature of a cross-petition) was untimely filed, under the circumstances herein, where through its authorized agent, the Board was negotiating a settlement with Respondent at the very time it was preparing the Petition for a Writ of Certiorari.

In view of the foregoing, the late filing should not preclude consideration by this Court of the significant issues raised by Respondent. However the Court may view Respondent's *Answer*, the questions posed herein by Respondent fall within the purview of Rule 23(1)(c) of the Rules of this Court, which states,

> "The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein".

Respondent respectfully submits that the subsidiary questions merit this Court's consideration.

II.

If, as Found by the Board, the Object of the Strike Was to Force Respondent to Consent to an Election, the Strike Was Not Activity Protected by the Act.

Legislative History.

Section 9 of the Wagner Act, *49 Stat. 453*, provided that in the course of its investigation of a question concerning the representation of employees, "the Board shall provide for an appropriate hearing. . . ." The Wagner Act Board in construing its authority under Section 9, apparently viewed the provision for "an appropriate hearing" to be permissive and not mandatory. Accordingly, prehearing elections were conducted. Opponents of the 1947 Taft-Hartley amendments *61 Stat. 143*, viewed the pre-hearing election as highly beneficial to union organizational efforts. In voicing his displeasure with the deletion from the Conference report of the provision for prehearing elections, Senator Morse said,

> "Under the conference amendment, however, the election will always have to be delayed until after the hearing the Board action, sometimes many months later, even though there is no reason why an immediate election cannot be held, except refusal of a recalcitrant employer or union desiring delay to consent."

Congressional Record, Senate, page 6611, June 5, 1947.

Senator Pepper, another critic of the 1947 amendments and in particular Section 9 (c) (4), said,

> "The effect of that [9(c)(4)] is, by implication, to prevent the Board from granting a prehearing election which as a practical matter, will delay the functioning of the Board in giving effect to the right of collective bargaining, which the bill professes to give to the workers of the country."

Congressional Record, Senate, Page 6675, June 6, 1947.

Despite the opposition, Section 9(c)(4) was passed by the Congress *without a provision for pre-hearing elections.* Section 9(c)(4) was not altered by the 1959 Landrum-Griffin amendments, *73 Stat. 525.*

If any doubt lingers as to the Congressional view of the importance of the pre-election "hearing" and the congressional intent that such hearing shall be an inviolate right of the parties to a representation proceeding, the statement of Senator Taft in a supplementary analysis of the Section 9(c)(4) as passed, should put such doubts to rest.

> "Section 9(C)(4): The conferees dropped from this section a provision authorizing prehearing elections. That omission has brought forth the charge that we have thereby greatly impeded the Board in its disposition of representation matters. We have not changed the words of existing law providing a hearing in every case unless waived by stipulation of the parties. *It is the function of hearings in representation cases to determine whether an election may properly be held at the time; and if so, to decide questions of unit and eligibility to vote.* During the last year the Board has tried out a device of holding the election first and then providing the hearing to which the parties were entitled by law. Since its use has been confined to an inconsequential percentage of cases, and more often than not a subsequent hearing was still necessary and because the House conferees strenuously objected to its continuance it was omitted from the bill." (Emphasis added).

Congressional Record, Senate, Page 7002, June 12, 1947.

The Board's statement of *"Procedure Under Section 9(c) of the [Wagner] Act for the Investigation and Certification of Representatives"*, made only a general reference to a hearing. In contrast, Section 102.63 of the Board's Rules and Regulations promulgated to implement Section 9 as amended in 1947, reflects recognition by the Board of the importance of the procedural *rights* granted to the parties by the Act. The functions of the Regional Director's investigation and of the hearing are clearly enunciated. After a petition is filed, absent consent by the parties to an election, the Regional Director must exercise his discretion and decide:

(a) Does a question of representation affecting commerce exist?

(b) Will an election effectuate the policies of the Act?

(c) Will an election reflect the free choice of the employees?

(d) Is the bargaining unit as described in the petition appropriate?

(e) Who is eligible to vote?

The record made at the "Hearing" forms the basis for the Regional Director's exercise of discretion. *The hearing must take place, unless waived by the parties. Section 102.63 (supra).*

Despite the clear mandate of the Congress, and its own elaborate regulations setting forth the rules for the processing of representation petitions, the Board *here* champions the use of the strike as a lawful means to force an employer to forego rights as important to em-

ployers as Section 7 is to employees. The Act charges the Regional Director with substantive duties in the investigation and processing of a representation petition. The Act, without equivocation or qualification grants to the employer a hearing *prior* to the election. The Board contends nevertheless, that the Regional Director's duties and the employer's rights are expendable. The Board declares that *a strike may lawfully be called to force an employer to consent to an election.*

Respondent disagrees! Such a strike is an act in derogation of and destructive to the policies of the Act and the Board's lawful processes. As such it should not be clothed with protections otherwise afforded to employees by the Act and those same processes.

The Pertinent Cases.

In support of the thesis that a strike to force an employer to consent to an election is activity that is lawful and protected by the Act, the Board cites two of its own decisions. *New Orleans Roosevelt Corp.*, 132 NLRB 248, and *Philanz Oldsmobile, Inc.*, 137 NLRB 867. Both decisions merit comment.

In *New Orleans Roosevelt* the petition was filed on April 22, 1959. Hearings were held in June and July 1959 and were not concluded as late as February 1960, at which time the Board reopened the hearing to receive evidence as to its legal jurisdiction. Thereupon, on February 2, 1960, the Union gave the employer *notice* that picketing would commence unless it agreed to a consent election. From the above facts, it is clear that the normally expeditious election processes of the Board had bogged down, and the Board on its own motion had reopened the hearing on the basic issue of its jurisdiction. It is fundamental that if the Board found

it lacked jurisdiction, it could not have directed that an election be held. It was under those extreme circumstances that the Union, after giving the employer *notice*, elected to strike. The Board's decision in *New Orleans Roosevelt* that the strike was a protected activity, is testimony to the wisdom of the oft quoted statement of Mr. Justice Holmes, that "hard cases make bad law." *Northern Security Co. v. United States*, 193 U.S. 197.

Following the decision in *New Orleans Roosevelt* the Board was faced with *Philanz Oldsmobile, Inc.*, (*supra*). There, a week after the petition was filed the employees informed the union representative that they were planning a walkout because they believed the employer was delaying the election. The union representative attempted to discourage the plans for a walkout, but nevertheless notified the employer of the contemplated strike and urged it to consent to an election. The employer took no action and the employees struck. A majority of the Board, citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 and *New Orleans Roosevelt*, held that the strike was protected activity. The majority's reliance upon *Washington Aluminum* was misplaced. There, no petition was pending before the Board, the employees were neither represented by nor allied with any labor organization, and perhaps most significant, the work stoppage was a protest over a condition of their employment (an unheated shop). *Washington Aluminum* does not stand for the proposition that a strike to force a consent election falls within the purview of Section 7. On the contrary, despite the fact that *New Orleans Roosevelt* was decided on July 20, 1961 and *Washington Aluminum*, on May 28, 1962, almost one year later, no reference to the extreme extension of Section 7 by the

Board in *New Orleans Roosevelt* was made by Mr. Justice Black, writing for this Court in *Washington Aluminum*. It would appear to Respondent that if this Court intended to extend Section 7 to a strike to force a consent election, it would have said so, citing *New Orleans Roosevelt*. In the absence of such citation, *Washington Aluminum* can not constitute authority in support of the Board's position herein.

Further, the majority in *Philanz Oldsmobile (supra)* exhibited some confusion as to the meaning of the word "consent" when they stated,

> "There is nothing in the Board's rules or in the Act which prohibits parties from agreeing to a consent election even where a representation petition has been filed at a regional office of the Board."

The question is whether the Act gives an employer the right to a hearing if he wishes to *withhold* his consent? The plain wording of Section 9 and the legislative history answer that question in the affirmative.

Board members Rodgers and Leedom recognized that right in their dissent in *Philanz Oldsmobile*, wherein they stated.

> ". . . we would confine New Orleans Roosevelt, supra, on which the majority relies in part, *to the facts therein*, namely, an authorized strike to compel a respondent to agree to a consent election when it was engaged in a deliberate attempt to delay the holding of a representation election. In the instant case it is clear that when the employees struck, there had been no undue delay in holding the election, and there is no evidence that

Respondent was seeking any unwarranted delay. Under these circumstances it would in our view, even had the strike been authorized, have made a mockery of the Board's consent election procedure to hold the objective protected and, in effect, have taken the word 'consent' out of such procedure."

Respondent submits that the dissent of Members Rodgers and Leedom is the correct statement of the law.

In *Harnischfeger Corporation*, 9 NLRB 676, 686, the Board said,

> "Section 7 of the Act expressly guarantees employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. We do not interpret this to mean that it is unlawful for an employer to discharge an employee for *any* activity sanctioned by a union or otherwise in the nature of collective activity." *cf., International Union, UAW v. Wisconsin ERB*, 336 U.S. 245.

The case authority cited by the Board is less than persuasive when contrasted with the clear language of the Act. The legislative history of Section 9(c)(4), only serves to underscore the importance of the pre-election hearing to the process of determining the representative status.

The Taft-Hartley Amendments were passed to correct some of the imbalance created by the Wagner Act, which was clearly designed to stimulate and promote union organizational efforts. An awareness that the balance of power had shifted twenty years later, is illustrated by Mr. Justice Frankfurter dissenting for him-

self and Justices Minton and Harlan in *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270. The dissent argued in favor of a strict application of the 60 day "no strike" requirement imposed by Section 8(d) of the Act.

> "We are therefore confronted with the demonstrable fact that if the provisions stripping strikers of their status during the 60 day period is to have any usefulness at all and not be an idle collection of words, the fact that a strike during that period is induced by the employer's unfair labor practice is immaterial. Even though this might on first impression seem an undesirable result, it is so only by rejecting the important considerations in promoting peaceful industrial relations. . . . *The Congress may have set a very high value on peaceful adjustments, i.e. the absence of strikes. One may take judicial notice that this consideration was at the very forefront of the thinking and feeling of the Eightieth Congress.*" (Emphasis added). *Mastro Plastics Corp. v. NLRB (supra).*

Again in *NLRB v. Insurance Agents International*, 361 U.S. 477, Mr. Justice Frankfurter writing for himself and Justices Harlan and Whitaker, noted in a separate opinion that the premise upon which the Wagner Act was passed—the inequality of bargaining power in favor of management, is no longer is valid.

> "The main purpose of the Wagner Act was to put the force of law behind the promotion of unionism as the legitimate and necessary instrument 'to give laborers opportunity to deal on equality with their employer.' Mr. Chief Justice Taft for the Court, in American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184,

209. Equality of bargaining power between capital and labor, to use the conventional terminology of our predominant economic system, was the aim of this legislation. The presupposition of collective bargaining was the progressive enlargement of the area of reason in the process of bargaining through the give-and-take of discussion and enforcing machinery within industry, in order to substitute, in the language of Mr. Justice Brandeis, 'processes of justice for the more primitive method of trial by combat.' Duplex Printing Press Co. v. Deering, 254 U.S. 443, 488 (dissenting). Promotion of unionism by the Wagner Act, with the resulting progress of rational collective bargaining has been gathering momentum for a quarter of a century. *In view of the economic and political strength which has thereby come to unions, interterpretations of the Act ought not to proceed on the assumption that it actively throws its weight on the side of unionism in order to redress an assumed inequality of bargaining power. For the Court to fashion the rules governing collective bargaining on the assumption that the power and position of labor unions and their solidarity are what they were twenty-five years ago, is to fashion law on the basis of unreality. Accretion of power may carry with it increasing responsibility for the manner of its exercise.*

Therefore, in the unfolding of law in this field it should not be the inexorable premise that the process of collective bargaining is by its nature a bellicose process. The broadly phrased terms of the Taft-Hartley Act should be applied to carry out the broadly conceived policies of the Act.

At the core of the promotion of collective bargaining, which was the chief means by which the great social purposes of the National Labor Relations Act were sought to be furthered, is a purpose to discourage, more and more, industrial combatants from pressing their demands by all available means to the limits of the justification of self-interest. This calls for appropriate judicial construction of existing legislation. *The statute lays its emphasis upon reason and a willingness to employ it as the dominant force in bargaining. That emphasis is respected by declining to take as a postulate of the duty to bargain that the legally impermissible exertions of so-called economic pressure must be restricted to the crudities of brute force.* Cf. Labor Board v. Fansteel Metallurgical Corp., 306 U.S. 240, 4 LRRM 515." (Emphasis added).

It is significant that in the twenty-five years since the enactment of Section 9(c)(4) only two Board decisions have treated with the legality of a strike to force a consent election. Respondent has been able to find no decision of a Circuit Court of Appeals, other than the Court below in this case, which has passed upon the propriety of a strike to compel a consent election. Considering the thousands of representation petitions filed each year, the only logical conclusion to draw from the paucity of decisional law on this issue, is that the Board's processes, and not resort to the strike, are being used to determine the representation issue.[2] The continued use of the orderly proc-

[2] "Simply stated, our national labor policy holds that industrial peace and stability is the desideratum. . . ." See *Jodice v. Calabrese*, 291 F. Supp. 592 (U.S.D.C., S.D.N.Y.), distinguishable on the facts.

cases of the Board will necessarily be jeopardized by this Court's approval or silence as to the propriety of the position taken by the Board and the Court below. To encourage the use of economic muscle in derogation of the peaceful and orderly machinery created by the Act, will be a giant step backward. This Court in *Boys Market, Inc. v. Retail Clerks*, 398 U.S. 235, has endorsed the peaceful resolution of industrial disputes, even at the expense of what was once considered the inviolate right to strike. The reasoning of Mr. Justice Frankfurter, in his dissent in *United Mine Workers v. Arkansas Oak Floor Co.*, 351 U.S. 62 lends support to Respondent's position that the strike which began on October 4, 1967, in the case at bench, should not be blessed with the protections afforded by the Act. Although *United Mine Workers v. Arkansas Floor Co. (supra)* dealt with noncompliance with the Act by the failure of the Union to file non-communist affidavits, the principle there involved is analogous to the instant case.

> "A noncomplying union such as the petitioner, however vigorously it may assert noncompliance as a matter of principle, is not under condemnation of illegality by the Taft-Hartley Act, or any other federal law, from employing economic pressure to achieve its goal. *The explicit consequence which that Act attaches to non-compliance is that such a union is denied the advantages of the National Labor Relations Board; it cannot utilize that Board's machinery to obtain certification as the bargaining representative or to secure redress against unfair labor practices by an employer.*"

Respondent does not question the right to strike free from the threat of injunction. The use of the injunction

is carefully prescribed and limited by the Act. Nevertheless, certain concerted conduct, not specifically enjoinable, has resulted in withdrawal of the protections of the Act. For example:

A strike conducted by a minority of a bargaining unit without authorization of the majority. *Confectionery and Tobacco Drivers and Warehousemen's Union, Local 805 v. NLRB*, 312 F.2d 108 (CA 2, 1963).

Selective refusal to perform certain aspects of the job, *i.e.* refusal to work overtime.

NLRB v. Valley City Furniture Co., 110 NLRB 1589, enforcement denied, 230 F.2d 947 (CA 8, 1946).

A strike to force an employer to violate the law. *Southern Steamship Co. v. NLRB*, 316 U.S. 31; *American News Co., Inc.*, 55 NLRB 1302.

See also *NLRB v. Insurance Agents International* (*supra*), wherein this Court noted that although a union did not violate Section 8(b)(3) by formulating a policy of harassment and slowdown tactics during bargaining for a new contract, such activities engaged in by the employees, may not be protected activities within the meaning of Section 7.

As this Court stated in *NLRB v. Truck Drivers Local 449*, 353 U.S. 87, which held that an employer may use the "lock out" as a weapon against an economic strike,

> "The ultimate problem is the balancing of conflicting and legitimate interests."

On the basis of the foregoing, the interests of the public expressed by the plain language of the Act and the policy which favors peaceful and orderly resolution

of labor relations problems, should prevail over a single minded view which has always favored the unbridled use of the strike. This is particularly true when, as here, the processes of the Board were in motion and were unhindered by the employer. The Board and the Court of Appeals below were therefore in error in holding this strike to be protected activity within the meaning of the Act.

III.

The Board's Alternative Finding That the Strike Was Protected Activity If Its Objective Was to Compel Recognition Is in Error.

The Board contends that a strike for recognition under the attendant facts is protected activity so long as Section 8(b)(7) was not violated. Here again the Board exhibits a position, solicitious of the right to strike and less concerned with its own processes and the Act, which purport to afford the employer certain rights. This tendency will be illustrated hereinbelow.

Legislative History.

Section 9 of the Wagner Act contained no specific requirements as to the content of a petition for representation. The language was general and left such details to the Board. The Taft-Hartley amendments resulted in a new Section 9, far more definitive than its predecessor. Of particular significance is the requirement of the amended Section 9(c)(1)(A)(i) (which was not altered by the 1959 Landrum-Griffin amendments) that a petition for representation filed by employees or a labor organization acting in their behalf, *allege that "their employer declines to recognize their representative . . ."* (Emphasis added). The Board's implement-

ing rules and regulations, at Section 102.61 reiterate that requirement. NLRB Form 502, the printed form for such petition (Resp App), at Item 7a provides for an appropriate entry to that effect.

The record of this case is clear and the Board does not contend otherwise, that neither prior to the filing of the petition on September 21, 1967, nor the commencement of the picketing on October 4, 1967, did the Union request recognition. The petition itself contains no entry at Item 7a (Resp App). It is therefore undisputed that the petition was defective in that it failed to comply with Section 9(c)(1)(A)(i) of the Act. The strike and the picketing continued until April 3, 1968.

Considering the substantial change from Section 9 of the Wagner Act to Section 9(c)(1)(A)(i) of the Taft-Hartley amendment, (the language of the Act that controls this case) it is reasonable to conclude that the remedial legislation of 1947 was intended to *require* notice to an employer in the form of a request for recognition, before the Board could entertain a petition. If such notice was not intended as a prerequisite to action by the Board, why then was such specific language included in the amendment? Moreover, it would appear that the Board in formulating its implementing rules and regulations, construed the language of 9(c)(1)(A)(i) as mandatory. Section 102.61 of the Rules and Regulations declares that the petition *shall* contain, *inter alia "A statement that the employer declines to recognize the petitioner. . . ."* (Emphasis added).

Further support for the argument that the Act was intended to require notice to the employer before the Board could entertain a petition, is the prefatory lan-

guage of Section 9(c)(1) which states that "Whenever a petition shall be filed, *in accordance with such regulations as may be prescribed by the Board*" etc. (Emphasis added) the machinery of the Board shall begin to function. As noted heretofore, the Board's regulations require that the employer decline recognition and that petition so allege. Failure to satisfy that requirement can only result in a petition which *has not been filed "in accordance with such regulations as* [*have been*] prescribed by the Board." The requirement having been couched both in the statute and in the implementing regulation as a condition precedent to the filing of a petition, the petition filed in this case on September 21, 1967, must be deemed fatally defective —a nullity. However technical the argument may appear, and however appealing the contention that the employer receives notice when served with a copy of the petition *after* it is filed, there can be no disagreement as to the plain language of both the statute and the regulation. There is no room for liberal interpretation. The legislative history militates in favor of strict construction.

It must follow then, that the picketing which had recognition as an objective, had continued for more than 30 days when in late November, 1967, striker Casillas, and in December, 1967, strikers Manuel and Robert Vasquez and Richard Dicus, requested reinstatement. At the time of each request for reinstatement, those strikers had for some time been picketing in violation of Section 8(b)(7) of the Act. It is sufficient that one object of the picketing was recognition. It is not fatal to a finding of a violation of 8(b)(7) that the picketing may also have been to protest the employer's unfair labor practices. The result of the strikers participa-

tion in the forbidden picketing is that they may not invoke the Act to compel reinstatement. *National Packing Company v. NLRB*, 377 F.2d 800, 804 (CA 10, 1967).

Cf., Warehouse and Mail Order Employees Union, Local 743, 144 NLRB No. 87.

Assuming *arguendo*, that Respondent did in fact violate Sections 8(a)(1) and (3) by its telegram of October 5, 1967, the participation thereafter of those strickers in picketing violative of the Act should nevertheless bar them from reinstatement. Their subsequent involvement in unprotected picketing should cancel out any prior violation of the Act by Respondent.

The Board may not properly contend that Respondent's unfair labor practice is a defense to picketing in violation of 8(b)(7). After a searching analysis of the legislative history of Section 8(b)(7), the Court in *Dayton Typographical Union No. 57 v. NLRB*, 326 F.2d 634 (CA DC, 1963) concluded *that only a violation of Section 8(a)(2) was intended by the Congress to constitute a defense to 8(b)(7) picketing.*

> "We can only conclude that the Conference and the Congress considered and deliberately abandoned the thought of making every employer unfair labor practice a blanket defense to an 8(b)-(7) charge." at p. 643
>
> * * *
>
> "We are unable to conclude that the House Conferees conceded in Conference that unfair practice picketing could lawfully continue beyond the 30 day period fixed by Section 8(b)(7) if such picketing also had an organizational or recognitional objective, or that either the Senate or the House intended that such picketing would be permitted under the 1959 Act." at p. 645.

For the foregoing reasons Respondent submits that at the time they requested reinstatement the strikers in this case were engaged in activities *not* protected by the Act.

IV.

The Strike That Commenced on October 4, 1967 Was Not in Protest Over a Labor Dispute Within the Meaning of the Act.

The Board and the Court below disagreed with the Trial Examiner's conclusion that no "labor dispute" existed between Respondent and the Union at the time the latter caused the strike to commence (Pet App 24, 40, 74).

NLRB v. MacKay Radio and Telephone Co., Inc., 304 U.S. 333, was offered by the Board and accepted by the Court of Appeals as authority for the general proposition that the wisdom or unwisdom of a strike, the justification or lack of it, does not alter its status as protected activity. It is noted that in *MacKay Radio* the strike occurred during contract negotiations. The Board here has lifted ~~that~~ Those references to "wisdom or unwisdom, justification or lack of it" out of their factual context. The complete statement is far more restrictive, and clearly focuses on the pending contract negotiations.

The Court said,

> "The wisdom or unwisdom of the men, their justification or lack of it, in attributing to respondent an unreasonable or arbitrary attitude in connection with the negotiations, cannot determine whether, when they struck, they did so as a consequence of or in connection with a current labor dispute."
>
> *NLRB v. Mackay Radio & Telegraph Co.* (*supra*) at page 344.

The flaw in the Board's position is that implicit in the *MacKay Radio* decision is the element of *good faith*. Respondent does not question the applicability of the protective features of the Act to concerted employee action, however mistaken their belief that they had a dispute with their employer, *so long as the Union or the employees act in good faith.*

The facts of the case at bench belie *good faith*. The facts spell "bad faith." The Union, having had no communication with Respondent, and having made no request or demand which had been denied or tabled by Respondent, fabricated a story of withdrawal by Respondent of its consent to an election (Pet App 73). On October 4, 1967, as soon as he discovered the false accusation Robert McEwan, Respondent's President, denied taking such action and so informed the striking employees who thereupon advised the Union of McEwan's statement of denial (A. 15, 17, 26). The true status of the Petition and Respondent's actions in respect thereto were at the time known to the Union. The Trial Examiner found the story of the withdrawal to have been a fabrication. (Pet App 73-74) It is obvious that the Union had no interest in pursuing the petition. The strike continued.

To characterize the above situation as a labor dispute is to sanction deceit any time a labor organization or group of employees seek to clothe intended conduct that may otherwise be unprotected, with the cloak of Section 7. The employees here are bound not only by their knowledge of Respondent's denial, but by the

knowledge of the Union, their designated agent, that the "so called dispute" was a fabrication.

The text of Section 2(9) itself can only be construed to mean that the controversies enumerated therein be real, or if mistaken, that such mistake be a good faith mistake. It is unreasonable to include within the purview of a "labor dispute" as defined by the Act, a dispute deliberately conjured up out of thin air. A false assertion made with knowledge of its falsity that a dispute exists is no more than a sham.

> "The Act has been interpreted as confering Board jurisdiction over a variety of labor matters, but there can be no jurisdiction where the complaint presents a controversy unrelated to the resolution of a 'labor dispute' as defined."
>
> *NLRB v. International Longshoremen's Association*, 332 F.2d 992, 995 (CA 4, 1964);
>
> *Sheetmetal Workers International Association, Local Union No. 223 v. Florida Heat & Power, Inc.* (Fla. App. 1968) 214 So.2d 783.

Based upon the foregoing, Respondent submits that when the employees ceased working to join the October 4 strike, no current labor dispute within the meaning of Sections 2(3) and (9) of the Act existed. Therefore, the protections of the Act could not be available to such strikers, who by their own conduct ceased to be employees within the meaning of Section 2(3).

V.

The Court of Appeals Was Correct in Holding That the Discharge of Economic Strikers Before They Have Been Permanently Replaced Does Not Automatically Entitle Them to an Unconditional Right to Reinstatement.

Respondent has urged this Court to find that the October 4 strike, either at its inception (Argument II and IV) or after the picketing had continued for more than 30 days (Argument III), was activity unprotected by the Act. Should this Court find merit in any of Respondent's contentions therein, it need not address the issue of reinstatement rights of the strikers. Convinced as Respondent may be of the merit of its position, prudence dictates discussion of this issue.

Respondent concedes that if the strike was a lawful concerted activity at its inception, and if the recognitional picketing beyond the 30 day limitation of 8(b)(7) did not deprive the strikers of their Section 7 rights, they are entitled to certain reinstatement rights.

The Board seeks a *per se* rule, which would automatically convert a wrongfully discharged economic striker into an unfair labor practice striker. On page 15 and 16 of its Brief, the Board says,

> "It is true, as the court below noted, that at the time of their discharges the four employees were protesting only the original grievance (Pet App 27). However, since the employees continued to strike after their unlawful discharge, it is reasonable to conclude that they were protesting not only the original grievance but also the subsequent unfair labor practice against them."

It is apparent then, that the Board would substitute *a conclusion* in lieu of the requirement imposed by the Court below, that there be *evidence* that the unfair labor practice was a significant factor in the prolongation of the strike. Examination of the record in this case shows clearly that only the signing by Respondent of a contract, and nothing short of that, would have ended the strike (Pet App 18, 19, 23, 26-27, 29, 32-37, 49-51).

The Court of Appeals at page 912, in Footnote 5 recognized the evidentiary vacuum and the defect in the Board's reasoning.

> "The Board argues that in this case, the Company's unfair labor practices were clearly 'a significant factor' in the strike, since the discharge of economic strikers 'necessarily * * * restrains employees from engaging in concerted activities for their mutual aid and protection * * *' The Board adduces no evidence in support of this necessary effect."

There was nothing revolutionary in the decision of the Court of Appeals in this case. In *NLRB v. James Thompson & Co.*, 208 F.2d 743 (CA 2, 1953), the Second Circuit enunciated the identical principle. The Board would distinguish *James Thompson* as involving a violation of 8(a)(1) by promising a wage increase while refusing to recognize the Union. The Board asserts that, here, the strikers were ready to return to work, but "were prevented from doing so because they had been unlawfully discharged." (Board's Brief, p.

17). The Board is in error. When the strikers applied for reinstatement (with the exception of Casillas, a casual employee) they were informed that Respondent had hired replacements (Pet App 37-38, 70). It was in respect to the issue of whether or not Respondent had legitimate and substantial business justification for not reinstating the strikers, that the Court of Appeals remanded the case to the Board.

This Court is faced with choosing between the Board's rule which ignores the evidence as to the cause of the continuation of the strike in favor of a *per se* rule, and the rule of the Court of Appeals that requires evidence of causation.

The purpose of the Act is remedial and not punitive. *Republic Steel Corp. v. NLRB*, 311 U.S. 7. The object of a remedial law is to correct the wrong—to restore the *status quo ante*. The Board in support of its position notes that a wrongfully discharged employee retains his protected employee status under Section 2(3) of the Act. What the Board ignores is that the "employee" status that is retained can only be the status held by the employee prior to the wrongful discharge. It cannot be seriously contended that there is no distinction between an actively working employee and one who is withholding his services (however lawfully) by participating in a strike. To grant to a discharged economic striker more than the reinstatement rights the unlawful discharge attempted to take away, is to do more than restore the *status quo ante*. There is neither logic nor need for such a remedy. It is sufficient to

nullify the illegal act. It is beyond the scope of a remedial law to give a discharged striker the reinstatement rights of a discharged active employee; or of an unfair labor practice striker, absent substantial evidence that the wrongful discharge was a significant factor in prolonging the strike.

NLRB v. James Thompson & Co. (supra);

NLRB v. Frick Co., 397 F.2d 956 (CA 3, 1968);

Cf., NLRB v. Jackson Press, Inc., 201 F.2d 541 (CA 7, 1953).

The brief *amicus* filed by the American Federation of Labor And Congress of Industrial Organizations, at page 2, states that the decision of the Court of Appeals "is an invitation to employers to rid themselves of union activists . . ." Respondent fails to see any basis for that statement. *MacKay Radio* permits an employer to permanently replace an economic striker. An employer who wishes to "rid" himself of any striker may simply replace him. That is the law. The decision of the Court below does not purport to expand upon that rule. The wrongful attempt to discharge an economic striker, according to the Court below, is ineffective. The striker retains all of his rights and is entitled to reinstatement so long as he applies for it before he is permanently replaced. If permanently replaced, he has preferential reemployment rights should a vacancy occur. *NLRB v. Fleetwood Trailer*, 389 U.S. 375.

The Court of Appeals correctly stated the reinstatement rights of the strikers in this case.

Conclusion.

Respondent submits that its position as set forth herein accurately reflects the law as written, and the intent of the Congress in enacting the 1947 and 1959 remedial amendments to the Act. Respondent further submits that the realities of labor-management relations today militates in favor of the use of existing procedures for peaceful and orderly determination of the representative status, as opposed to the strike in derogation of those procedures.

There is no longer a need or a justification for interpretations of the Act as the Board seeks herein, predicated more on outdated policy considerations than the language of the Act and the legislative intent. Labor stands today, at the very least, with strength and resources equal to those of Management. The law should be the neutral arbiter, protecting the rights of each protaganist in accordance with the applicable provisions of the Act.

In view of the foregoing, the decision of the Court of Appeals should be reversed and the Board's complaint dismissed in its entirety.

Dated: July 12, 1972.

Respectfully submitted,

NORMAN H. KIRSHMAN,
Attorney for Respondent.

GOLDSTEIN, GENTILE & KIRSHMAN,
Of Counsel.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

PETITION

DO NOT WRITE IN THIS SPACE	
CASE NO.	-6 -666
DATE FILED	2-21 67

INSTRUCTIONS.—Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located. If more space is required for any one item, attach additional sheets, numbering item accordingly.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

1. Purpose of this Petition (If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.)

(Check one)

- [X] RC-CERTIFICATION OF REPRESENTATIVES—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- [ ] RM-REPRESENTATION (EMPLOYER PETITION)—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- [ ] RD-DECERTIFICATION—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
- [ ] UD-WITHDRAWAL OF UNION SHOP AUTHORITY—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- [ ] UC-UNIT CLARIFICATION—A labor organization is currently recognized by employer, but petitioner seeks clarification of placement of certain employees: (Check one) [ ] In unit not previously certified [ ] In unit previously certified in Case No. ________
- [ ] AC-AMENDMENT OF CERTIFICATION—Petitioner seeks amendment of certification issued in Case No. ________

Attach statement describing the specific amendment sought.

2. NAME OF EMPLOYER	EMPLOYER REPRESENTATIVE TO CONTACT	PHONE NO.
INTERNATIONAL VAN LINES		

3. ADDRESS OF ESTABLISHMENT(S) INVOLVED (Street and number, city, State, and ZIP Code)
2756 Industrial Way, Santa, Maria, California

4a. TYPE OF ESTABLISHMENT (Factory, mine, wholesaler, etc.)	4b. IDENTIFY PRINCIPAL PRODUCT OR SERVICE
Van Line	Moving Service

5. Unit Involved (In UC petition, describe PRESENT bargaining unit and attach description of proposed clarification.)

Included: All truck drivers, packers, craters, order fillers, checkers, warehousemen, loaders, helpers and working foremen employed by the employer at its Santa Maria, California location

Excluded: Office clerical employees, professional employees, guards and supervisors as defined in the Act.

6a. NUMBER OF EMPLOYEES IN UNIT: PRESENT C.5; PROPOSED (BY UC/AC) ________

6b. IS THIS PETITION SUPPORTED BY 30% OR MORE OF THE EMPLOYEES IN THE UNIT?* [X] YES [ ] NO

*Not applicable in RM, UC, and AC

(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)

7a. [ ] Request for recognition as Bargaining Representative was made on ________ (Month, day, year) and Employer declined recognition on or about ________ (Month, day, year) (If no reply received, so state)

7b. [ ] Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

8. Recognized or Certified Bargaining Agent (If there is none, so state)

NAME	AFFILIATION
None	
ADDRESS	DATE OF RECOGNITION OR CERTIFICATION

9. DATE OF EXPIRATION OF CURRENT CONTRACT, IF ANY (Show month, day, and year)	10. IF YOU HAVE CHECKED BOX UD IN 1 ABOVE, SHOW HERE THE DATE OF EXECUTION OF AGREEMENT GRANTING UNION SHOP (Month, day, and year)
11a. IS THERE NOW A STRIKE OR PICKETING AT THE EMPLOYER'S ESTABLISHMENT(S) INVOLVED? YES ____ NO X	11b. IF SO, APPROXIMATELY HOW MANY EMPLOYEES ARE PARTICIPATING?

11c. THE EMPLOYER HAS BEEN PICKETED BY OR ON BEHALF OF ________ (Insert name) A LABOR ORGANIZATION, OF ________ (Insert address) SINCE ________ (Month, day, year)

12. ORGANIZATIONS OR INDIVIDUALS OTHER THAN PETITIONER (AND OTHER THAN THOSE NAMED IN ITEMS 8 AND 11c), WHICH HAVE CLAIMED RECOGNITION AS REPRESENTATIVES AND OTHER ORGANIZATIONS AND INDIVIDUALS KNOWN TO HAVE A REPRESENTATIVE INTEREST IN ANY EMPLOYEES IN THE UNIT DESCRIBED IN ITEM 5 ABOVE. (IF NONE, SO STATE.)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM (Required only if Petition is filed by Employer)
None			

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

TEAMSTERS & WAREHOUSEMEN, LOCAL 381, International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America
(Petitioner and affiliation, if any)

BRUNDAGE & HACKLER

By ________ (Signature of representative) George W. Pappy — Attorneys for Petitioner (Title, if any)

Address 1621 West Ninth Street, Los Angeles, Calif. 90015 (Street and number, city, State, and ZIP Code) — 385-3071 (Telephone number)

WILLFULLY FALSE STATEMENT ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)